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No. 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

ROBERT SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner contends in his initial brief in this Court (I) that he was subjected to compulsory interrogation by the Subcommittee without probable cause and (II) that the "question under inquiry" supplied by the Government in its bill of particulars precludes a finding that petitioner was apprised of a precise question under inquiry at the hearing and precludes a conviction on a different question under inquiry at the trial.[1] Unable to answer directly peti-

[1] Petitioner's brief also contends (Points III, IV) that the conviction must be reversed because the indictment failed to state the "question under inquiry" and because petitioner was deprived of his right to a fair and impartial grand jury. Petitioner's brief on these two points relies upon the brief of petitioner in *Russell* v. *United States*, No. 8, and petitioner relies for reply to the Government's argument on these two points upon the oral presentation to be made by counsel for petitioner in No. 8.

tioner's contentions on either of these points, the Government's brief advances wholly new "confession-and-avoidance" arguments in this Court. Concerning probable cause, the Government now asserts that the Fourth Amendment is inapplicable to compulsory Congressional interrogation and that the First Amendment provides only a diluted standard of "cause" and one whose observance in a particular case is not open to judicial review. Concerning the bill of particulars on the "question under inquiry", the Government now asserts that this issue is not preserved on appeal and that the receipt of contradicting evidence at the trial constituted automatic amendment of the bill of particulars. As we demonstrate below, the Government's new arguments only reenforce the necessity of a reversal of petitioner's conviction if Congressional inquiries and federal criminal trials are to meet minimal standards of procedural regularity and fair notice.

I

The Fourth, Fifth and First Amendments, Jointly and Severally, Forbid Affirmance of Petitioner's Contempt Conviction on a Record Devoid of Evidence That the Subcommittee Had Cause for Interrogating Him.

The prosecution opened in the District Court with the Government asserting the right of a Congressional committee to call "a man off the street" and interrogate him by compulsory process concerning possible Communist associations (R. 40).

The prosecution winds up in this Court with the Government seeking to protect the conviction predicated upon its "man off the street" contention by a newly conceived, three-step argument on probable cause, as follows:

(i) that the Fourth Amendment's probable cause requirement does not apply to compulsory Congressional interrogation;

(ii) that under the First Amendment, which admittedly does apply to such interrogation, Congressional committees may compel a witness to answer on mere likelihood rather than actual probability that the witness has relevant information;

(iii) that a committee's failure to meet even this "likelihood" requirement of the First Amendment is judicially unreviewable in a contempt prosecution.

It is readily apparent that this three-step progression is only a more refined version of the "man off the street" contention advanced by the Government in the District Court and thus the Government has now come full circle back to its initial trial position. It might suffice for petitioner simply to point out that the result for which the Government now contends would put Congressional process totally beyond the pale of judicial review and would permit the very dragnet inquiries against which this Court has repeatedly inveighed. As we shall show, however, we need not rest upon the grotesque *result* of the Government's argument, for each of the three steps of its progression—each of which must be independently accepted by this Court for an affirmance—is separately and patently erroneous.[2]

[2] The Government's position on whether petitioner adequately preserved the Fourth Amendment probable cause defense before the Subcommittee is confusing at best. While the Government appears to be urging waiver of Fourth Amendment rights (pp. 41-43), the Government's brief elsewhere expressly concedes (p. 14) that petitioner's objection before the Subcommittee "appears . . . to raise the issue of 'probable cause'" and that (p. 30) petitioner's objection there "seems to claim that the Subcommittee did not have probable cause to subpoena him. . . ."

A. *The Government's Contention that the Fourth Amendment Does Not Apply to Compulsory Congressional Interrogation is Erroneous*

The Government is aware that its probable cause argument stands or falls on its view that the Fourth Amendment is inapplicable to Congressional interrogation. Rather than contending that there is an adequate showing of probable cause on this record, the Government instead places its emphasis on its view that the Subcommittee was not required to have probable cause for its interrogation of petitioner. Indeed, it expressly concedes (p. 59) that it "might be true" that, if the Subcommittee was required to have probable cause for interrogating petitioner, then within normal Fourth Amendment principles this record fails to make an appropriate showing.

The Government's rash argument (p. 44) that the Fourth Amendment affords no protection against "the requirement that a person appear briefly before a Congressional committee", is supported neither by history, nor precedent nor logic. Of the significant pre-constitutional history set forth in petitioner's brief (pp. 38-49) demonstrating the precise applicability of the Fourth Amendment right of privacy to the seizure and interrogation of the person no less than his possessions, the Government says nothing. Of the relevant portions of this Court's landmark precedents in *Boyd* and *Brimson*, set forth in petitioner's brief (pp. 36 to 38), the Government likewise says nothing. And re-

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Since the Government thus twice concedes that petitioner did raise "probable cause", its suggestion that he should in addition have made specific reference to the Fourth Amendment (the only constitutional provision containing the words "probable cause") approaches absurdity. In any event, as pointed out in our initial brief (p. 32, n. 9), the Government's waiver contention, made for the first time in this Court, is also wrong on the facts and wrong on the law.

garding the specific assertions of this Court in *Watkins*, *Barenblatt* and *Wilkinson*, that "search and seizure" and "probable cause" requirements do apply to Congressional interrogation, the Government now suggests that this Court was using Fourth Amendment terminology to indicate that the First Amendment does, and the Fourth Amendment does not, apply. Nor does the Government give any reason or logic for its contention that the historic privacy guarantees of the Fourth Amendment apply to a man's papers and possessions but not to his thoughts and his expressions.

The restrictive view of the Fourth Amendment tendered to this Court by the Government comes much too late in the development of our constitutional heritage. The Government having made no serious effort to defend petitioner's conviction if the probable cause requirement of the Fourth Amendment is applicable, the Court need go no further to reverse petitioner's conviction than to state what petition hardly deemed necessary of expression—that *Watkins*, *Barenblatt* and *Wilkinson*, applying "search and seizure" and "probable cause" to Congressional inquiry, were intended to prescribe the applicability of the Fourth Amendment thereto. But even if, for argument's sake, it were assumed that "the requirement that a person appear briefly before a Congressional committee" is somehow outside probable cause and due process protections[3] and subject only to First Amendment guarantees, as the Government urges, it still does not follow that less cause or justification is required for a compulsory Congressional search of a man's

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[3] While the Government seeks, albeit unsuccessfully, to explain away the applicability of the Fourth Amendment, it makes no reference whatever to the Fifth Amendment requirement of due process, equally relied upon by petitioner to bar his conviction on the present record (R. 37, 181, 210). It is too late in the day to contend that Congressional process need not be due process. *Watkins* v. *United States*, 354 U.S. 178.

mind under the First Amendment than for a constable's search of his papers and effects under the Fourth Amendment.

B. *The Government's Contention that under the First Amendment Congressional Committees May Interrogate on Mere Likelihood Rather than Actual Probability is Erroneous*

Having urged this Court to substitute the First Amendment for the Fourth Amendment as the constitutional guarantee against arbitrary Congressional interrogation, the Government then seeks, as the second step in its progression, to dilute the postulated First Amendment protection. It asserts (p. 51) that this protection is "not the same as the 'probable cause' required for arrest or search and seizure under the Fourth Amendment." The Government urges that under the First Amendment, if "committees must have the kind of proof to subpoena a witness as police do to make an arrest, the result will be seriously to hamper Congressional inquiries," and that therefore Congressional committees must have "discretion to subpoena witnesses where there is any substantial likelihood that they possess information of value . . ." (Brief, p. 52). Having first urged that cause to subpoena a witness before a Congressional committee is only guaranteed by the First Amendment and not by the Fourth Amendment, the Government then urges that a Congressional committee does not require probable cause but merely "any substantial likelihood" of the witnesses' knowledgeability, to be determined in the committee's "discretion."[4]

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[4] The Government nowhere makes clear the exact meaning of its less-than-probable-cause standard. Once, however, "probability" is no longer the standard, it is doubtful whether there is any stopping place short of mere "possibility" or "chance". Significantly, the Government would give greater latitude to a compulsory Congressional inquiry without probable

The Government's diluted standard of "likelihood" and "discretion" would invite Congressional committees to engage in dragnet and haphazard inquiry and to do so in the most delicate areas of political freedom and personal belief and expression. If the danger to constitutional freedoms which this doctrine would create is not adequate answer to the Government's position, the history of the bill of rights demonstrates that, far from attenuated applicability, the privacy guarantees of the Constitution have *additional significance* in areas of First Amendment concern. Only last year, this Court emphasized that "The bill of rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrants*, 367 U.S. 717, 729. Far from approving diminished procedural rights in areas of First Amendment protection, the Founding Fathers sought procedural guarantees against dragnet inquisition to prevent a repetition of Star Chamber and High Commission abuses. To the extent that procedural First Amendment protections come into play in the compulsory interrogation of the citizen, as the Government concedes they do, Congressional committees are not thereby subject to diminished but rather to more stringent requirements of fairness and "cause" in the use of compulsory power.

We respectfully submit that, if there is any difference in standards of "cause" under the First and Fourth Amendments, our constitutional history would favor more not less stringent requirements of "cause" under the former. The second step of the Government's progression is thus no more acceptable than the first. But, even were this Court somehow to accept the principle of procedural looseness in

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cause, although Congress is exercising but secondary investigative powers in aid of its principal legislative task, than to prosecutors and grand juries exercising primary investigative power.

political inquiry advanced by the Government, it is still crystal clear that, since there is no showing *whatsoever* in this record of cause or grounds or reason or likelihood for the Subcommittee's interrogation of petitioner, his conviction must fall equally under the Government's attenuated First Amendment standard.

C. *The Government's Contention that a Committee's Failure to Meet Even the "Likelihood" Requirement of the First Amendment Is Judicially Unreviewable in a Contempt Prosecution Is Erroneous*

The court below, eschewing reliance upon the supposed anonymous letter withheld by the Government at the trial, approved petitioner's interrogation by the Subcommittee on the expansive theory that "it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees" (R. 244). The Government appears to have no faith in this man off the working press or man off the Times theory, for it has abandoned any effort to justify petitioner's interrogation on this rationale. Instead of the theory of the court below that a Congressional committee may call "a man off the working press" or the theory of the prosecutor and the District Court that a committee may call "a man off the street," the Government places its reliance in this Court upon a wholly new theory —namely, that a Congressional committee's assertion in a contempt prosecution that it had reason to believe the witness possessed of pertinent information, forecloses further defense and judicial review upon the constitutional issue. Posed in terms of this case, the Government's contention is that the Subcommittee Counsel's assertion—no matter how manifestly false—that there was an anonymous letter implicating petitioner, was untestable by the defense

and unreviewable by the court. In sum, while the Government admits the need under the First Amendment for the "likelihood" of relevant information by the subpoenaed witness, it would effectively deny to the witness the opportunity to prove at his trial the absence of "likelihood" and thus the violation of what the Government concedes to be his constitutional right.

Initially, we question whether the Government can substitute in this Court a different theory of "cause" than the one upon which petitioner was convicted in the District Court.[5] Having unsuccessfully sought in the District Court to rely upon a document which it would not produce, the Government cannot now sustain the criminal conviction by asking this Court to assume a fact—the existence of the letter—which the District Court, as the trier of fact, refused to find. See *Giordenello* v. *United States*, 357 U.S. 480. But even were the Government at liberty to make such a substitution on appeal, it is nevertheless clear that no more

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[5] By quoting out of context *half* a sentence of the District Court's opinion, the Government seeks to imply that the Judge found probable cause based upon the factors advanced by the Government in this Court (Brief, p. 35). Examination of the District Court's opinion will reveal that the portions of the Court's opinion immediately surrounding the half-sentence quoted by the Government makes clear that the Court "found" probable cause as an afterthought, and *only* on the basis of the theory now discarded by the Government that any employee of the New York Times could, without more, be subject to compulsory interrogation. The entire quotation from the District Court is as follows (R. 223):

> "*Beyond the fact that the Court does not find judicial power to determine what witnesses Congress may call in furtherance of its legislative purposes and compel pertinent testimony thereon*, the record of this case discloses beyond any reasonable doubt that the subcommittee had information in its possession at the time defendant was initially summoned to appear before it which established a reasonable cause for requiring his testimony. *The subcommittee had information, apart from the confidential letter, which indicated communist infiltration into the New York Typographical Union and elements of the New York newspapers, including the one by which the defendant was employed*" (unitalicized portion is what Government quotes).

than the courts below can this Court find "cause" in a supposed anonymous letter which the Government withheld at trial.

Yet the Government here blandly assumes the existence of and the alleged contents of the letter for purposes of validating petitioner's conviction (Brief, pp. 5, 53, 55-56, 59, 61). But the prosecution cannot base "cause" on the asserted contents of an anonymous letter and then hide behind "privilege" to withhold the letter from the defense. See, e.g., *United States* v. *Coplon*, 185 F. 2d 629, *cert. denied*, 342 U.S. 920. We contend here, as we did below, that the anonymous document about which witness Sourwine testified in the most contradictory and incredible fashion (see petitioner's brief, pp. 11-13) never existed or, if there is such a letter, that it either does not contain the information witness Sourwine purported to recollect or reveals on its face its own unreliability. In any event, unless the Sixth Amendment is to be held inapplicable in prosecutions under 2 U.S.C. § 192, it is submitted that the Government cannot make its constitutional showing of probable cause *or* likelihood through an anonymous document it refused to produce at the trial and upon which, for that reason, the trial judge who convicted petitioner refused to place any reliance.

The Government, of course, knows that if "cause" for the Subcommittee's interrogation of petitioner was litigable as an issue at petitioner's contempt trial, then petitioner was denied his Sixth Amendment rights by the Government's refusal to produce the supposed anonymous letter. Yet at the same time the Government is afraid to venture a candid espousal before this Court of the view that the Subcommittee's "cause" to interrogate petitioner was wholly unlitigable and unreviewable in the District Court. Accordingly, the Government (Brief, pp. 59-60) tenders a hybrid argument to this Court. It suggests that petitioner's right to litigate the question of cause went

no further than to require the Subcommittee to "present material" (p. 59) showing the basis of its decision to interrogate him and that the Subcommittee counsel having asserted the existence of information possessed by the Subcommittee (i.e., the "letter"), this was "evidence" which was "sufficient" for the Court to decide that the Subcommittee had "cause" (pp. 59-60). Realizing that such "evidence" can be "sufficient" only if the defense in a contempt case need not be confronted with evidence of "cause", the Government urges that trial of this issue "is not to be limited by the strict requirements of a criminal prosecution" (p. 60), by which the Government presumably means the requirements of the Sixth Amendment. Yet, the Government knows that it cannot rest on so blunt a departure from methods of judicial proof and therefore it urges additionally that the question of "cause" is not judicially reviewable. Thus, the Government argues that "the sufficiency of the information or reasons which cause a committee to call a witness" is not to be "subject to plenary judicial review" (p. 59) and that "the decision whether to subpoena a witness is mainly for the legislative body" (p. 60). Stripped of purposeful ambiguity, the Government is finally telling this Court that the constitutional issue respecting the Subcommittee's "cause" for calling petitioner is not to be tried at all; rather, says the Government, a committee employee having asserted "cause", the federal court must convict without further inquiry into the issue—i.e., without normal judicial review on a relevant constitutional defense (pp. 59-60).

We find it difficult to unravel the tangled argument the Government is addressing to this Court. *If* the Government is saying that the question of "cause" *is* litigable in a contempt prosecution, then the simple answer is that the Sixth Amendment knows no short-cut method of proof and secures a defendant's rights to challenge a commit-

tee's "evidence" of cause; petitioner's conviction thus cannot stand because the Government suppressed at trial the document upon which it relies. *If*, on the other hand, the Government is telling this Court that the question of cause is *not* judicially reviewable in a contempt prosecution, then affirmance is equally precluded. For the Government expressly concedes it was petitioner's First Amendment right not to be interrogated by the Subcommittee unless it believed him likely to have pertinent information, and *we know of no view under which petitioner could be barred from the assertion and trial of this relevant constitutional issue before being convicted of contempt for refusal to answer.* As Mr. Justice Frankfurter emphasized in his concurring opinion in *Watkins* v. *United States*, 354 U.S. 178, 216, by "making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the constitution relating to the prosecution of offenses and those implied restrictions under which courts function." Thus, to suggest, as the Government does, that the question of "cause" is not judicially reviewable in a contempt prosecution, is to make the federal courts vehicles for the adjudication and punishment of criminality without power to try and to determine constitutional questions upon whose resolution criminality necessarily depends. The Government's unreviewability argument cannot be accepted by this Court, for it would empower Congressional committees to subpoena the "man off the street" and require the courts to punish him for contempt regardless of the validity of his constitutional objection to answering the Committee's dragnet inquiry.

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By a succession of escalating contentions the Government hopes to have this Court approve petitioner's conviction for declining to answer questions before a Congressional committee though the record fails to contain a shred of admissible evidence that the Subcommittee had any cause or justification whatsoever for compelling petitioner to answer. First, the Government urges that the Fourth Amendment does not apply to compulsory Congressional interrogation. Next, it claims that under the First Amendment Congressional committees may conduct compulsory interrogation on the "likelihood" rather than the probability that the witness has relevant information. And finally, even that likelihood, or the lack thereof, is made judicially unreviewable in a contempt prosecution by the Government's view that it is entitled to rely for "cause" on evidence insulated from normal defense confrontation and judicial review. By this sequence of arguments, without repeating the more candid pronouncement of prosecutor Hitz at trial, the Government arrives at the same terminus—a Congressional committee may subpoena the "man off the street" and, if he refuses to answer because called without cause or justification, it may punish him for contempt.[6] Unless Congressional process is to be wholly

[6] The failure of the Government to prove "probable cause" or "likelihood" at trial underlines the significant fact that the Subcommittee failed to demonstrate or even assert "cause" when petitioner challenged the Subcommittee's jurisdiction on this ground at the hearing (R. 83-84). Perhaps under these circumstances, as in the *Watkins* case, this Court need go no further than to find that the Subcommittee's failure to respond denied petitioner fair notice under the Fifth Amendment. The Government makes no pretense that the Subcommittee ever gave petitioner the information about an anonymous letter which it subsequently sought to make the basis for a judicial finding of probable cause. Clearly, if the Subcommittee indeed had a basis for interrogating him, petitioner was entitled upon his appropriate objection to be so informed at that time. Otherwise, through ignorance of facts known only to the Subcommittee, petitioner could mistakenly believe that the Subcommittee had no probable cause or likelihood for interrogating him. It seems

free of constitutional limitations, the Government's arguments must fall and the conviction must be reversed on a record which fails in any way to justify petitioner's compulsory interrogation.

II

The Government's Bill of Particulars Precludes a Finding That Petitioner Was Apprised of a Precise Question Under Inquiry at the Hearing and Precludes a Conviction at the Trial on a Question Under Inquiry Disavowed in the Bill.

A. *Question Under Inquiry at the Hearing*

Petitioner contends that the Subcommittee's failure to inform him of the question under inquiry at his interrogation denied him due process under the Fifth Amendment. In response, the Government urges that petitioner failed to inform the Subcommittee of his doubts concerning the nature of its inquiry and that the Subcommittee was therefore under no obligation to make the matter clear to him (Brief, pp. 25-32).

But at the very outset of the Subcommittee hearing petitioner stated, "I challenge the jurisidiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose . . . Furthermore, I fail to see why I am involved in this hearing . . ." (R. 84). In declining to answer certain of the subsequent questions put to him, petitioner each time reasserted his challenge to the "jurisdiction" of the Subcommittee. We submit that it is wholly immaterial that petitioner did not

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only fair that if a committee has probable cause and is challenged on this score by a witness—as it was here—the committee contemporaneously make the cause manifest.

use the word "pertinence" in making his objections. Petitioner's statement that "I fail to see why I am involved in this hearing" was a clear expression to the Subcommittee of his doubts concerning the question under inquiry which the Subcommittee desired to pursue with him. In such circumstances, the Fifth Amendment due process clause requires that a committee make *some answer* to the witness so that he may determine whether in fact the committee is pursuing with him a relevant line of question which he is required to answer. But to petitioner's inquiry, the Subcommittee made no answer.

The Government additionally urges that the subject of the Subcommittee's inquiry *was* made clear by statements of its members at the hearing regarding the Subcommittee's interest in Communist infiltration of news media. As demonstrated in petitioner's brief (pp. 17 to 21), the scope and nature of the Subcommittee's investigation, far from having such clarity and precision, has been in continuous doubt not only at the Subcommittee hearing but throughout this entire proceeding. In any event, even if it were to be conceded for sake of argument that the Subcommittee had sufficiently indicated its interest in Communist influence in news media as the subject of its investigation, what the Subcommittee manifestly declined to reveal was what relationship, if any, existed between petitioner and the subject of the investigation, i.e., *the question under inquiry in the interrogation of Robert Shelton.*[7]

But there is another and even more fatal flaw in the Government's contention that petitioner was apprised that

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[7] Recognizing and attempting to justify the Subcommittee's refusal to reveal the pertinency nexus between *petitioner* and the question under inquiry, the prosecutor asserted at trial that "We need not show pertinency between the question asked and defendant" (R. 33) and that "any question that is pertinent to that subject could be asked of anyone at all, even the most innocent person . . ." (R. 40).

the question under inquiry was Communist influence in news media. The Government provided a bill of particulars stipulating that the question under inquiry at the hearing was Communism generally and no "smaller, more limited inquiry . . ." (R. 20). It hardly lies in the mouth of the Government to contend that petitioner was apprised of a question under inquiry at the hearing which the Government stipulated was in fact *not* the question under inquiry at the hearing at all. Nor was petitioner required to defend at the trial on the theory that the question under inquiry at the hearing was anything other than what the bill of particulars said it was—i.e., Communism generally. Since that question under inquiry is not sufficiently precise under *Watkins* (see petitioner's brief, pp. 59-62) and since the Government does not even contend that it is sufficiently precise under *Watkins*, petitioner's due process rights were clearly violated before the Subcommittee.

B. *Question Under Inquiry at the Trial*

In any event, if doubt could conceivably remain that petitioner's due process rights were violated by the Subcommittee, there can be no question, in light of the bill of particulars, that the Government failed at the trial to prove a valid question under inquiry as required by 2 U.S.C. § 192. Petitioner has been convicted on the basis of a *different* "question under inquiry" from that upon which he was being tried under the bill of particulars furnished by the Government. To this point the Government now responds by asserting that petitioner has not preserved the question for this Court's review and that the bill of particulars was automatically "amended" at trial by evidence received which tended to contradict it. We demonstrate below, by a review of the sequence of relevant events, that the Government is wrong on both counts and that peti-

tioner was legally prejudiced by his conviction predicated on a different material element of the offense from the one for which he was tried.

(i) The very essence of a violation of 2 U.S.C. § 192 is failure to answer questions relevant to a "question under inquiry". Although the indictment against petitioner alleged the existence of a "question under inquiry", it failed to state what that question was. Petitioner moved to dismiss the indictment on this ground, among others, asserting his inability to determine a material element of the offense for which he was to be tried (R. 10). When this motion was denied, petitioner asked for and received a bill of particulars on the same subject, in order to ascertain in preparing his defense "what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was . . ." (R. 16).

(ii) In the bill of particulars the Government gave as the "question under inquiry" to be proved under the indictment the entire authorizing resolution of the Subcommittee and *no "smaller, more limited inquiry . . ."* (R. 20). At no time before the trial or during the trial did the Government indicate any desire to depart from this question under inquiry which it had elected.[8] Nor indeed, contrary to what the Government now tells this Court (Brief, pp. 38, 40, 41), did the Government offer evidence at trial inconsistent with its bill of particulars. Rather, upon cross-examination of witness Sourwine, *petitioner* demonstrated that in the opinion of Subcommittee Counsel Sourwine there were four different questions under inquiry

[8] The Government's Brief (p. 37) quotes two statements by the Assistant United States Attorney as if they purported to refine the bill of particulars, without pointing out that the quotations are not a part of the Government's bill of particulars at all, but are taken from the previous argument before the court on the motion to dismiss the indictment (R. 17).

before the Subcommittee when petitioner was testifying (R. 138-139).

(iii) Petitioner's counsel began the closing argument to the trial court by urging the failure of the Government to prove the question under inquiry which it had elected by its bill of particulars and urging a fatal variance between that bill of particulars and evidence elicited by petitioner on cross-examination of witness Sourwine (R. 199-200).[9] The rebuttal argument by the prosecutor utterly disre-

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[9] "ARGUMENT ON BEHALF OF DEFENDANT

"Mr. Rauh: The defense contends that the Government has failed to prove what, if any, was the question under inquiry by the committee when it called defendant. Mr. Hitz, in answer to an oral question during our oral request for a bill of particulars, stated that the inquiry was the full scope of the resolution. He said as to the second asking that the Government contends and the indictment states that the inquiry being conducted was pursuant to this resolution. We do not feel and it is not the case that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose. So that in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution. . . .

"And therefore we have a bill of particulars, if Your Honor please, which states that the question under inquiry, which is what Your Honor has to find these questions pertinent to under Section 192, is the full scope of 366.

"The Court: I would like to have you particularly direct your argument to Section 3, if you don't mind. I might tell you the Court has some idea now that the inquiry might have been pertinent to Section 3.

"Mr. Rauh: Yes, I shall do that.

"My first point at this stage, if Your Honor please, is that there has been a variance between the bill of particulars, in which Mr. Hitz claimed that the question under inquiry was S. 366, and the testimony of the Government that the question under inquiry was a number of other things which Mr. Sourwine then detailed. In other words, there is no testimony in this record that the question under inquiry is what Mr. Hitz said it was, namely, the full scope of S. 366. In other words, the Government has failed to prove a question under inquiry from which this Court can rule that the questions are pertinent.

"As I understand the Government's burden, it is, first, to prove what the question under inquiry is and then to show that these questions are related to it. Now I state that the Government has failed to prove that 366 was the question under inquiry, and since that was their statement in the bill of particulars, we have a fatal variance in their proof. . . ."

garded the bill of particulars; so did the opinion of the District Court which, contrary to the bill of particulars, found that the "question under inquiry" before the Subcommittee had been, not its general authorizing resolution as stipulated, but an inquiry into Communism in "the news media" (R. 225).

(iv) Petitioner repeated in the Court of Appeals (contrary to the present suggestion of the Government that he did not "raise this issue in the court of appeals"—Brief, p. 23) his challenge to the adequacy of proof of a question under inquiry under the indictment and briefed extensively the significance of the bill of particulars by which the Government had bound itself. Petitioner specifically urged upon the Court of Appeals that (Brief for Appellant, p. 17, n. 7):

> "All apart from Fifth Amendment considerations of fair notice to the witness at the time of the hearing, appellant's conviction cannot stand where, as here, the Judge found the 'question under inquiry' to be *other* than the 'question under inquiry' to which the Government bound itself by its answer to the bill of particulars. See *United States* v. *Neff*, 212 F. 2d 297, 309-310. The Judge could not properly find as proven a 'question under inquiry' which the Government was estopped from proving."

In his reply brief below, petitioner reiterated the objection (p. 4):

> "Of course, all apart from the *Watkins* rule, there was clear error below in the Government's failure to prove the 'question under inquiry', a burden imposed upon it by the statute itself. The trial judge found as proven a 'question under inquiry' which the Govern-

ment was estopped by its bill of particulars from attempting to prove . . ."

Again, however, the Government declined in the court below to make any reference whatever to the bill of particulars; nor did the Court of Appeals address itself to this question.

(v) In seeking certiorari, petitioner renewed his arguments predicated upon the bill of particulars. Petitioner urged that the question under inquiry was inadequately defined not only from the point of view of constitutional but also from the point of view of "statutory requirements", and that the question under inquiry had not been defined sufficiently precisely "to serve as a 'question under inquiry' within the meaning of 2 U.S.C. § 192" (Pet. 26). In opposition, the Government then mentioned its bill of particulars *for the first time in the entire case* and denied that any bill had been furnished (Opp. p. 15, n. 7). When petitioner pointed out to this Court the blatant inaccuracy of this Government representation (Reply Memorandum, pp. 4-8), the Government filed a Supplemental Memorandum admitting that it had been in "error" in denying the existence of a bill of particulars, but urging that in any event there was no critical variance between the bill of particulars on the "question under inquiry" and the evidence introduced at the trial (pp. 3-4).

(vi) Petitioner's brief on the merits having demonstrated the wide disparity between the bill of particulars in which the Government had disavowed any smaller inquiry than the Subcommittee's general authorizing resolution and the District Court's finding of the more limited inquiry into Communism in news media, the Government has now tendered a wholly new argument on the bill of particulars. Now the Government tells this Court (pp. 39-

40) that the bill of particulars was amended *sub silentio* and *nunc pro tunc* when evidence inconsistent therewith was adduced at trial and that petitioner was not "prejudiced" by the variance between the question under inquiry the Government elected under the indictment and that which was found by the District Court.[10]

But to say that when a defendant disproves on cross-examination a material element of the offense—i.e., the question under inquiry as stipulated in a bill of particulars—the bill thereby becomes automatically amended, is to say that a defendant may be found guilty of a different crime than that with which he is charged. Under this facile theory, the Government proves a crime whether the allegation of its bill of particulars is sustained by proof or defeated by cross-examination.

Equally startling is the Government's contention as to "prejudice." Although the bill of particulars disavowed any more limited inquiry before the Subcommittee than its authorizing resolution, according to the Government petitioner must have surmised from the transcripts of the hearings that the Government would prove a different "question under inquiry" (Brief, pp. 40-41). In the face of the unequivocal bill disavowing any "more limited inquiry being conducted" than Communism generally, the Government asserts that "petitioner knew long before his trial that that the government would attempt to prove that

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[10] The Government also suggests that while the bill of particulars stated that there was no "smaller, more limited inquiry being conducted" by the Subcommittee, the Assistant United States Attorney *"apparently meant"* only to say that the Subcommittee was not compelled to show a smaller, more limited inquiry than its full authorizing resolution (Brief, p. 36). Suffice it to say that a criminal defendant has not heretofore been required to surmise what an Assistant United States Attorney "apparently meant" in a bill of particulars, especially when the surmise as to apparent intention is directly contrary to what is actually contained in the bill.

the specific subject under inquiry by the Subcommittee was Communist activity in the communications field" (p. 41). In short, petitioner was suposed to surmise that the Government would attempt to prove at trial what it had specifically said in its bill of particulars that it would not prove.[11]

Proof of the specific "question under inquiry" is an integral part of the prosecution's burden of proof under 2 U.S.C. § 192. What is perfectly clear is that petitioner who believed he was being tried for the crime of refusing to answer questions pertinent to the subject of Communism generally was convicted of the wholly different crime of refusing to answer questions pertinent to the more limited subject of Communism in the news media. Nothing could be more clearly prejudicial than to be convicted for a crime different than the one for which a person is being tried and to which his defense is directed (see R. 210-211). Yet that is exactly what occurred here. To affirm under these circumstances would validate not only all the imprecision and looseness of process which characterized petitioner's hearings before the Subcommittee, but would compound that evil by unprecedented imprecision and looseness in his subsequent federal trial for contempt.

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[11] The Government's Brief (pp. 38-41) repeatedly refers to evidence which the Government offered at trial as if there had been some point in the trial when the Government actually made proof of the question under inquiry. The Government urges that petitioner was at that point required to claim prejudice from the variance between the bill of particulars and the proof offered by the Government (p. 41). Actually however, the prosecutor never once made reference to the question under inquiry throughout the entire trial. The only reference to the matter was not by the Government, but on cross-examination by petitioner of witness Sourwine. Accordingly, petitioner was never put on notice by anything the Government did at trial that it would rely on a different question under inquiry than the one it had elected in its bill of particulars. Petitioner thus never had the opportunity to object on the ground of variance from the bill of particulars until his argument for acquittal, when he made this exact point as his first argument (R. 199).

It is respectfully submitted that petitioner's conviction should be reversed with instruction to enter a judgment of acquittal.

Respectfully submitted,

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